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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

IN RE PACIFIC FERTILITY CENTER
LITIGATION

This Document Relates to:
No. 3:18-cv-01586
(A.B., C.D., E.F., G.H., and I.J.)

Master Case No. 3:18-cv-01586-JSC

**PLAINTIFFS' MOTION IN LIMINE NO. 3:
BAD ACTS EVIDENCE**

Pretrial Hearing: April 29, 2021
Time: 2:00 p.m.
Judge: Hon. Jacqueline S. Corley
Place: Courtroom F, 15th Floor

Trial Date: May 20, 2021

INTRODUCTION

During the parties' upcoming trial, Defendant Chart intends to introduce a variety of evidence that paints the Pacific Fertility Center (PFC) in a poor light. The Court has already ruled on some of this bad acts evidence. It found that evidence PFC violated the standard of care by backdating its liquid nitrogen measurements was admissible, but evidence PFC violated the standard of care by occasionally using buckets to refill its tanks was not. (3/19/21 Order at 9-10, ECF No. 724.) The pivotal consideration in the Court's analysis was whether the infraction could have realistically caused or contributed to the March 4, 2018 incident at the heart of this case. With respect to backdating, the Court accepted Chart's argument that a jury could find that "these deviations from the standard of care are a part of what caused the Tank failure," and observed that PFC's conduct also could support an inference of guilty knowledge. (*Id.* at 9.) With respect to buckets, however, the Court noted that even Chart's expert did "not believe that this practice caused the March 4 incident, and as such it falls within the category of inadmissible bad acts evidence." (*Id.* at 10.) Likewise, when Chart sought to introduce evidence that PFC had violated the standard of care by allowing Tank 4's liquid nitrogen levels to drop to zero in 2013 and again in 2014, the Court found the causal connection Chart was attempting to draw between 2013/14 safety infractions and the 2018 accident was too attenuated and excluded Chart's evidence. (*Id.* at 9-10.)

Plaintiffs now request that the Court review some additional bad acts evidence that Chart intends to use during trial. Chart intends to introduce a January 2017 inspection report that found PFC failed to meet the standard of care in a number of respects unrelated to the March 4th incident. PFC did not perform contact testing on its plasticware, for example, and did not have a certificate of accuracy on file for one of the lab's thermometers. This evidence—which none of Chart's experts rely on or reference, in connection with a causation or any other opinion—is more akin to PFC's use of buckets than it is to PFC's backdating of Tank 4's liquid nitrogen levels: the evidence may show that PFC committed technical infractions, but those infractions could not have realistically caused or contributed to the March 4th incident, and therefore constitute inadmissible bad acts evidence.

Plaintiffs also request that the Court limit the backdating evidence Chart is permitted to introduce at trial. The Court has already determined that Chart's forensic analyst can describe the

backdating he uncovered in PFC's digital records, and that Chart's lab expert can opine that PFC's backdating of records constitutes a violation of the applicable standard of care. Chart will also be permitted to question PFC employees about their involvement in the backdating. But Chart now also wants to question one of PFC's former attorneys, Elizabeth Balassone, about the backdating and the declaration she submitted earlier in this case. If Chart believes Ms. Balassone was somehow involved with the backdating or submitted a false declaration, it should have pursued discovery sanctions against PFC's lawyers. But Chart should not now be permitted to bring a discovery dispute into trial, suggest that PFC's lawyers engaged in bad acts, and then urge jurors to hold those bad acts against PFC when rendering their verdict.

ARGUMENT

A. The deficiencies identified during PFC's 2017 inspection do not relate to the March 4th incident and are inadmissible under Rule 404(b).

Chart's Trial Exhibit 364 is an Inspector's Summation Report that identifies 27 deficiencies found during a January 2017 inspection of PFC's facilities. (Trial Ex. 364 (MSO011323).) Below are examples of some of these deficiencies:

- RLM.03800 – contact material testing isn't performed on plasticware
- RLM.03935 – emergency power not tested quarterly in 2016
- RLM.03975 – disposition of IVF sperm not documented
- COM.01400 – no appropriately signed attestation forms
- GEN.54400 – personnel records – no diploma or transcripts
- GEN.75400 – fire safety training – no record of annual training
- COM.30450 – new [reagent] lot confirmation of acceptability – no parallel testing against old lots

Chart wishes to use these deficiencies to suggest to the jury that PFC's lab director and embryologists are sloppy or careless, and thus more likely to have acted negligently in connection with the tank failure a year later. But Rule 404 prohibits the use of bad acts evidence for that purpose. *See Jones v. S. Pac. R.R.*, 962 F.2d 447, 450 (5th Cir. 1992) (finding train operator's prior safety infractions were inadmissible to prove he was negligent on the day of the accident or had a habit of conducting

1 trains negligently); *see also In re Pfizer Inc. Sec. Litig.*, 288 F.R.D. 297, 318 (S.D.N.Y. 2013)
 2 (“[defendant’s] prior acts of negligence are not admissible to prove that it was negligent here”).

3 Much like PFC’s occasional use of buckets to fill its tanks, the infractions cited in the January
 4 2017 report do not appear to have caused or contributed to the March 2018 tank accident. Up to this
 5 point, no Chart witness or expert has cited to or referenced any of these infractions as a potential cause
 6 of or contributor to the incident. Unless and until Chart can demonstrate a connection, it should not be
 7 permitted to introduce Trial Exhibit 364 into evidence, question PFC about the January 2017
 8 inspection, or refer to any of the deficiencies identified during the January 2017 inspection.

9 **B. Chart should not be permitted to call PFC’s former attorney as a witness at trial.**

10 Chart previously sought to depose one of PFC’s former attorneys: Elizabeth Balassone, who
 11 was an associate at Morrison & Foerster in 2018 and is now a Senior Appellate Court Attorney at the
 12 California Court of Appeal. (*See* 9/23/20 Joint Case Management Statement at 4, ECF No. 556.)
 13 Chart’s forensic analyst had discovered that Ms. Balassone altered one of the entries in PFC’s
 14 Reflections lab monitoring database, and Chart wanted to depose Ms. Balassone about that alteration.
 15 (*Id.*) In response, PFC’s attorneys provided Chart with a declaration from Ms. Balassone, which
 16 explained that her alteration was inadvertent and immediately corrected. (*Id.*; *see also* Trial Ex. 158.)
 17 Chart continued to insist that a deposition was necessary, but eventually dropped the matter after the
 18 Court stated that its “nonbinding reaction is that you don’t need her deposition” during one of the
 19 parties’ Case Management Conferences. (09/24/20 Tr. at 20, ECF No. 566.) The Court told Chart that it
 20 could formally raise the issue by filing a letter brief, but Chart elected not to press the issue further.

21 Chart now says that it intends to call Ms. Balassone and question her about the declaration she
 22 submitted last September. Chart’s apparent strategy is to identify inaccuracies in Ms. Balassone’s
 23 declaration to impugn PFC by undermining its former attorney’s credibility. Ms. Balassone stated in
 24 her declaration that she had been navigating through PFC’s Reflections dashboard when she
 25 inadvertently lowered one liquid nitrogen measurement by 0.1 cm. (Trial Ex. 158, ¶ 4.) Ms. Balassone
 26 also stated that the change was an accident and she immediately clicked the entry again to attempt to
 27 restore it to its original measurement. (*Id.*) A review of the underlying metadata suggests that Ms.
 28 Balassone’s recollection of events was not quite accurate: she did lower one liquid nitrogen

1 measurement, but by 0.4 cm instead of 0.1 cm; and she did attempt to restore the entry to its original
 2 measurement, but was unsuccessful—instead of restoring the value to 12.3, she entered a value of 12.2.
 3 (Trial Ex. 102, 11/06/20 Report of J. Cauthen at 20.) Nothing in Chart’s forensic analysis undermines
 4 the primary point of Ms. Balassone’s declaration, however: her alteration of the Reflections data was
 5 inadvertent, she made no other changes, she was never asked to make any changes to the Reflections
 6 data, and she accessed the Reflections data only for the purpose of evaluating the information stored in
 7 that database for production purposes. (Trial Ex. 102, ¶ 5.)

8 Plaintiffs request that the Court preclude Chart from calling Ms. Balassone at trial. Her
 9 testimony is not sufficiently probative to justify putting one of PFC’s former attorneys on the witness
 10 stand. And if Chart is permitted to question the truthfulness of Ms. Balassone’s declaration, there is a
 11 significant risk that the jury will be distracted from the central issues in the case or that juror members
 12 will be unfairly prejudiced against PFC. If Chart believed that Ms. Balassone’s declaration was false or
 13 submitted in bad faith, it should have informed the Court and sought an appropriate remedy. It should
 14 not be permitted to drop the issue during discovery only to re-introduce it during trial. *See Snyder v.*
 15 *Bank of Am., N.A.*, No. 15-CV-04228-KAW, 2020 WL 6462400, at *11 (N.D. Cal. Nov. 3, 2020)
 16 (“there does not appear to be any proper purpose for introducing this discovery dispute; it does not go
 17 to the merits of the case”).

18 CONCLUSION

19 Plaintiffs request that the Court limit the bad acts evidence that Chart is permitted to introduce
 20 during trial. Chart has been permitted to inquire into certain entries that PFC employees altered after the
 21 March 4th incident. But the purpose of that examination should remain centered on what it says about
 22 the amount of liquid nitrogen in Tank 4 in the days and weeks leading up to the March 4th incident. It
 23 should not become the central issue in the case, and it should not lead to testimony about unrelated
 24 safety infractions or attacks on the credibility of PFC’s former lawyer. Plaintiffs accordingly request

25 //

26
 27 //

1 that the Court preclude Chart from calling Ms. Balassone as a witness or introducing evidence that PFC
2 was cited for laboratory deficiencies during a prior inspection.

3
4 Dated: April 14, 2021

Respectfully submitted,

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

IN RE PACIFIC FERTILITY CENTER
LITIGATION

Case No. 3:18-cv-01586-JSC

**DEFENDANT CHART INC.'S
OPPOSITION TO PLAINTIFFS'
MOTION IN LIMINE NO. 3: BAD
ACTS EVIDENCE**

This Documents Relates to:
No. 3:18-cv-01586
(A.B., C.D., E.F., G.H. and I.J.)

Pretrial Hearing: April 29, 2021
Time: 2:00 p.m.
Judge: Hon. Jacqueline Scott Corley
Place: Courtroom F, 15th Floor

Trial Date: May 20, 2021

INTRODUCTION

Chart intends to introduce evidence detailing PFC's carelessness in its operation of the laboratory. Included in this evidence is a January 2017 College of American Pathologists (CAP) inspection report that found PFC failed to meet the standard of care in a number of respects and identifies 27 deficiencies. (Trial Ex. 364 [MSO011323]). Additionally, Chart also intends to question as a fact witness Elizabeth Balassone, one of PFC's former attorneys, about her direct involvement in backdating PFC's digital records. (Trial Ex. 158). Plaintiffs filed their Motion in Limine seeking to exclude this evidence under Rule 404(b) of the Federal Rules of Evidence.

This Court already ruled on the admissibility of certain bad acts evidence. (Order, Mar. 19, 2021, ECF No. 724). Importantly, this Court determined that evidence of PFC's backdating Tank 4's liquid nitrogen records is admissible, explaining that a jury could find it to relevant to what happened to Tank 4 to cause Plaintiffs' damages and that the conduct could support an inference of guilty knowledge. (*Id.* at 9). For the same reasons, the CAP inspection report and Ms. Balassone's testimony are likewise admissible.

ARGUMENT

A. The January 2017 CAP inspection report is relevant and admissible.

Like the evidence related to backdating records, the CAP inspection report supports an inference of guilty knowledge against PFC. In addition to the examples cited in Plaintiffs' Motion, the CAP report also lists the following deficiencies:

- RLM 12300: No procedure to ensure viable recovery rates for cryo.
- COM 01700: No evaluation of AAB¹ challenge 1.2016 or 2.2016 for andrology or embryology. No investigation of "unacceptable" results.
- COM 0100: Not following written policy on performing and submitting PT results.
- COM 01600: No schedule for testing personnel rotation for performance of PT.

¹ AAB – the American Association of Bioanalysts – is a professional association and accrediting agency for clinical laboratory scientists, supervisors, directors, and consultants. (https://www.aab.org/aab/About_ABB.asp)

- 1 • COM 30700: Need certificate of accuracy for NIST² thermometer.
- 2 • GEN 16902: QM Implementation – QM plan not reviewed annually for effectiveness.
- 3 • GEN 20316: QM indicators of quality – no indicators.
- 4 • GEN 20375: Document control – posted documents not controlled, handwritten
- 5 corrections not initialed or dated.
- 6 • GEN 55450: Initial training – no training records.
- 7 • GEN 55500: Competency assessment – no document of assessing the required 6
- 8 elements.
- 9 • GEN 55525: Performance assessment of supervisors/consultants – no documentation.

10 (Trial Ex. 364).

11 The foregoing deficiencies are necessary to provide the jury with the entire background for
 12 the context in which the tank incident occurred. They are part of PFC’s systemic violations of the
 13 standard of care and its failure to adequately maintain records, service equipment, train laboratory
 14 personnel, and review and revise quality management procedures. One portion of Chart’s defense
 15 is that this conduct is causally connected to what happened to Tank 4 – the seminal issue in this
 16 case. Importantly, this evidence establishes that PFC had knowledge its conduct in the weeks
 17 leading up to the incident was not in conformity with the standard of care and was not merely a
 18 coincidence or mistake. The deficiencies cited in 2017 are similar to those exhibited by PFC
 19 personnel one year later, prior to the incident. For example, “posted documents not controlled,
 20 handwritten corrections not initialed or dated” is directly related to PFC’s backdating records and
 21 its failure to maintain records. Additionally, the absence of documentation related to training,
 22 competency assessments, and performance assessments calls into question the proficiency and
 23 practices of the laboratory personnel.

24 Rule 404(b) states that evidence of other crimes, wrongs, or acts is not admissible to prove
 25 the character of a person in order to show action in conformity therewith. Fed. R. Evid. 404(b). It
 26 may, however, be admissible for other purposes, including but not limited to “proof of motive,

27

 28 ² NIST – the National Institute of Standards and Technology – is “one of the nation’s oldest physical science
 laboratories.” Established by Congress, it operates as part of the Department of Commerce and provides technology,
 measurements, and standards to a broad spectrum of industries. (<https://www.nist.gov/about-nist>)

1 opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of
 2 accident.” *Id.* “Rule 404(b) is a rule of inclusion – not exclusion – which references at least three
 3 categories of other ‘acts’ encompassing the inner workings of the mind: motive, intent, and
 4 knowledge.” *United States v. Wells*, 879 F.3d 900, 928 (9th Cir. 2018) (citing *United States v.*
 5 *Curtin*, 489 F.3d 935, 944 (9th Cir. 2007)). The similarities between the conduct described above
 6 make the CAP report admissible to show PFC’s knowledge, plan, absence of mistake, and lack of
 7 accident. *United States v. Pruett*, 681 F.3d 232, 244-5 (5th Cir. 2012) (evidence of prior violations
 8 of the Clean Water Act were admissible under Rule 404(b) to circumstantially establish defendant
 9 knowingly violated the Act). This is evidence of how PFC ran its business.

10 The cases cited by Plaintiff are inapposite. In *Jones*, evidence of the defendant train
 11 operator’s prior safety infractions – for speeding, failure to identify himself on the radio, failure to
 12 display headlights, and the like – were inadmissible to prove that he had a habit of conducting
 13 trains negligently under Rule 406. *Jones v. Southern Pacific R.R.*, 962 F.2d 447, 449-50 (5th Cir.
 14 1992). The Fifth Circuit explained that the train operator had only nine infractions over a career
 15 spanning 29 years, which could “hardly be characterized as a habit.” *Id.* at 450. Here, Rule 406,
 16 which governs “habit evidence,” does not apply. Instead, the evidence is admissible under Rule
 17 404(b)(2) as non-propensity evidence of knowledge and absence of mistake or coincidence.
 18 Additionally, unlike the infractions in *Jones*, PFC was cited for the deficiencies only one year prior
 19 to the incident (not over a period of 29 years) and they are remarkably similar to those exhibited
 20 in the weeks leading up to the incident.

21 Plaintiffs’ reliance on *In re Pfizer* is likewise unpersuasive. The “bad acts” alleged in *In re*
 22 *Pfizer* related to abuse of discovery throughout the course of the litigation, which is not alleged
 23 here. *In re Pfizer Inc. Sec. Litig.*, 288 F.R.D. 297, 318 (S.D.N.Y. 2013).

24 The 2017 CAP inspection records about PFC are admissible and excluding them would be
 25 unfairly prejudicial to Chart’s defense that PFC caused Plaintiffs’ damages.

26 **B. Chart should be permitted to call Ms. Balassone as a witness at trial.**

27 Plaintiffs also seek to exclude Ms. Balassone from testifying about the alterations she
 28 personally made to an entry on the Reflections lab monitoring database. Plaintiffs, however, fail

1 to offer any legal authority to support their position. As noted above and in Plaintiffs' Motion,
 2 this Court already determined that evidence of PFC's backdating is admissible. It follows then that
 3 Ms. Balassone's testimony regarding her involvement as a fact witness in backdating PFC records
 4 is likewise admissible. Like the testimony of PFC personnel, Ms. Balassone's testimony creates
 5 an inference of guilty knowledge and is admissible under Rule 404(b). Additionally, contrary to
 6 plaintiffs' assertion, her testimony will not distract the jury from the central issues of this case.
 7 Rather, her testimony relates to a key component of Chart's defense: PFC's backdating of records.

8 Moreover, it is of no consequence whether Chart continued to pursue its request to depose
 9 Ms. Balassone after she tendered her affidavit. Whether a witness sat for their deposition has no
 10 bearing on the admissibility of their testimony at trial. Instead, relevance and probative value are
 11 key considerations, both of which have already been determined through this court's ruling that
 12 evidence of backdating is admissible.

13 CONCLUSION

14 WHEREFORE, Defendant Chart, Inc. respectfully requests this Honorable Court deny
 15 Plaintiffs' Motion in Limine No. 3 and admit the January 2017 College of American Pathologists
 16 report (Trial Exhibit 364) and permit Chart to call Ms. Balassone to testify at the trial in this cause.

17 Dated: April 15, 2021

Respectfully submitted,

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